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February 18, 2010

Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20024

**Re: Finance Docket No. 35346; Nebraska Northwestern Railroad, Inc.—  
Purchase, Lease and Operation Exemption—  
Dakota, Minnesota & Eastern Railroad Corporation**

Dear Sir or Madam:

Enclosed for filing are the original and ten copies of Nebraska Northwestern's Reply to the Joint Petition of Nebkota Railway, Inc. and West Plains Company for Rejection or Stay of the captioned exemption, including the verified statement of George LaPray.

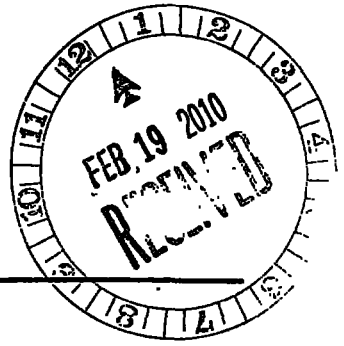
Very truly yours,

Enclosure

cc: Thomas F. McFarland  
Paul M. Donovan  
Terrence M. Hynes

ENTERED  
Office of Proceedings  
FEB 19 2010  
Part of  
Public Record

BEFORE THE  
SURFACE TRANSPORTATION BOARD



STB FINANCE DOCKET NO. 35346

ENTERED  
Office of Proceedings

FEB 19 2010

Part of  
Public Record

NEBRASKA NORTHWESTERN RAILROAD, INC.  
PURCHASE, LEASE AND OPERATION EXEMPTION  
DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION

REPLY OF NEBRASKA NORTHWESTERN RAILROAD, INC.  
TO JOINT PETITION FOR REJECTION AND STAY OF CLASS EXEMPTION

Nebraska Northwestern Railroad, Inc. ("NNW"), by its undersigned counsel, hereby submits its reply to the Joint Petition for Rejection and Stay of Class Exemption, and Supplement thereto, filed by Nebkota Railway, Inc. ("Nebkota") and West Plains Company in this proceeding.<sup>1</sup>

As stated in the Verified Notice of Exemption filed by NNW, NNW has reached agreement with Dakota, Minnesota & Eastern Railroad Corporation ("DM&E") to purchase DM&E's rail line between Mile Post 404.5 near Chadron, Nebraska and Mile Post 411.72 Engineering Station 7492 +73 near Dakota Junction, Nebraska, and will lease and operate DM&E's rail line between the last-named point and Mile Post 432.6 near Crawford, Nebraska. The length of the purchased line segment is 7.22 miles, and the length of the leased line segment is 20.88 miles. The length of the rail line to be operated by NNW is

<sup>1</sup> DM&E, the owner and lessor of the line at issue in the exemption, plans to file its own reply to the Joint Petition on February 19, 2010.

28.1 miles. NNW will be a Class III rail carrier upon consummation of these transactions after the exemption becomes effective.

The Joint Petition raises two arguments against the transactions agreed upon by DM&E and NNW. First, it alleges the transactions would have a “serious adverse effect” on Nebkota and West Plains Company because they would result in the loss of Nebkota’s connection with DM&E. Second, it argues that “safety would be seriously compromised” by NNW’s planned operations over the line. Neither of these arguments is supported by the facts.

With respect to the first argument, NNW is acquiring the rail line between Chadron and Crawford subject to the preexisting trackage rights of Nebkota, which have been in existence since Nebkota commenced operations in 1994 (LaPray V.S., p. 2). DM&E is assigning Nebkota’s trackage rights agreement to NNW in the transactions described above (*Ibid.*, p. 3). The interchange point between DM&E and Nebkota will be moved from Chadron to Dakota Junction (*Ibid.*). Nebkota will continue to be able to interchange traffic with two rail carriers, DM&E at Dakota Junction and BNSF Railway at Crawford, after NNW consummates the planned transactions.

With respect to the second argument, the number of carriers operating over the line will be no different after the transactions are consummated than it is today. Following the sale of the Chadron-Dakota Junction line, DM&E will no longer operate over that line, and thus NNW (owner) and Nebkota (tenant) would be the only carriers having operating rights (LaPray V.S., p. 3). With respect to the Dakota Junction-Crawford line, while DM&E will have the right to operate over the line, it has entered into an agreement whereby NNW will haul its traffic (*Ibid.*). The result, again, is that two rail carriers (NNW and Nebkota) will be operating over the line, just as two rail carriers operate over it today. The DM&E-Nebkota trackage rights agreement, which will be assigned by DM&E to NNW, will continue to govern operations over this line.<sup>2</sup> Under the agreement Nebkota is required to conduct its operations “in

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<sup>2</sup> DM&E will file a copy of this agreement with the Board as an exhibit to its aforementioned reply.

accordance with the rules, instructions, and restrictions of CNW” – and its successors-in-interest DM&E and subsequently NNW. See Trackage Rights Agreement at § 4.7. NNW will be required to accommodate Nebkota trains “with reasonable diligence and dispatch” in accordance with mutually agreed schedules (*Ibid*). As a result, Nebkota’s allegation that there will be confusion over the “operating protocols” on the line is baseless.

As parties seeking revocation, Nebkota and West Plains have “the burden of proof.” *I&M Rail Link, LLC – Acquisition & Operation Exemption – Certain Lines of Soo Line R.R. Co. d/b/a/ Canadian Pac. Ry.*, 2 S.T.B. 167, 174 (1997). “[P]etitions to revoke must be based on reasonable, specific concerns demonstrating that reconsideration of the exemption is warranted and regulation of the transaction is necessary”(*Ibid*). Nebkota and West Plains have not come close to meeting their burden to demonstrate that this standard is satisfied. Instead, they cite an inapplicable line of cases in which the Board held that it “will reject a notice” of exemption “in cases where unresolved issues arise” (*Winamac Southern Ry. Co.—Trackage Rights Exemption—A. & R. Line, Inc.*, F.D. No. 35208 (decision served January 9, 2009)(not printed).) But the Board has only invoked this “unresolved issues” doctrine in extreme and unique situations, such as where the railroad purportedly granting trackage rights opposes the proposed transaction (*Winamac Southern, supra*), where the Board lacks jurisdiction over the proposed transaction (*FPN-USA, Inc.—Operation Exemption—Tijuana-Tecate Short Line*, F.D. No. 35155 (decision served August 8, 2008)(not printed),) or where the Board is missing fundamental facts about the proposed transaction, such as the agreement covering the transaction and the location of the subject rail line (*Pro-Go Corp.—Operation Exemption—In Suffolk County, N.Y.*, F.D. No. 35126 (decision served March 13, 2008)(not printed).)

Here there are no such unresolved issues. NNW has stated the facts of the transactions proposed to be exempted with the required particularity. The selling and leasing carrier, DM&E, has not objected. Nebkota’s rights to use the subject line and to interchange with DM&E will not be disturbed, except for the relocation of the Nebkota-DM&E interchange to Dakota Junction. But for the exemption, the

proposed transactions are clearly within the Board's jurisdiction. Indeed, this is just the sort of "routine and non-controversial case" that doesn't require regulatory scrutiny (*Winamac Southern, supra*). Therefore, there is no basis for rejection of NNW's Verified Notice of Exemption.

The Board relies on the following standards in determining whether to grant a stay request: (1) whether petitioner is likely to prevail on the merits of an appeal; (2) whether petitioner will be irreparably harmed in the absence of a stay; (3) whether issuance of a stay would substantially harm other parties; (4) whether issuance of a stay is in the public interest (*Washington Metropolitan Area Transportation Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Circuit 1977); *Virginia Petroleum Jobbers Assn. v. FPC*, 259 F.2d 921 (D.C. Circuit 1958); *Gauley River R., LLC Abandonment and Discontinuance of Service*, STB Docket No. AB-559 (Sub-No. 1X)(decision served July 21, 2000)(not printed).)

The Joint Petition does not address these standards, and it is clear that this case does not satisfy them. The transactions in question would result in the creation of a Class III rail carrier, just as hundreds of similar transactions have done over the past quarter century. If the exemption becomes effective, the likelihood that it would be overturned on the merits is infinitesimal. Neither petitioner would be irreparably harmed if the exemption becomes effective as scheduled, since Nebkota's connection with DM&E would not be severed and its status as tenant on the subject line would not change. A stay would delay the consummation of NNW's transactions with DM&E, and would serve no public interest.

Nebkota and West Plains Company filed a supplement to their Joint Petition on February 17, 2010. The supplement seeks rejection or stay of NNW's exemption on grounds that NNW did not respond to a letter request from counsel for Nebkota and West Plains Company for the documents which memorialize the transactions between NNW and DM&E.

There is no reason why the exemption should be rejected or stayed on that basis. The documents sought by Nebkota and West Plains Company contain confidential information concerning the terms of the transactions and the business relationship between NNW and DM&E, and the transaction documents

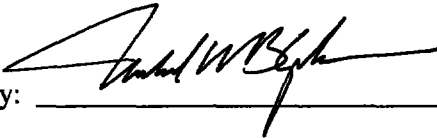
contain confidentiality provisions that prohibit NNW from disclosing its agreements with DM&E to a third party like Nebkota. NNW is not required to make such documents available in connection with filing an exemption notice, and the Joint Petitioners cite no authority to the contrary. It is worth noting that the Joint Petition was filed just two days after the Joint Petitioners' letter request, which casts considerable doubt on their claim that the documents were necessary for them to "comment" on the exemption.

As for the specific "request for information" described in the Supplement—"whether NNW intended to cancel or continue in effect a Haulage Agreement between NRI and DME"—the answer is that this agreement has *not* been assigned to NNW, and therefore the future of the agreement is not within NNW's control (LaPray V.S., p. 2). As stated above, NNW has no intention of disturbing Nebkota's existing contractual rights. Nebkota will continue to have the right to interchange traffic directly with DM&E, though the interchange point will be relocated from Chadron to Dakota Junction.

Accordingly, NNW respectfully requests the Board to deny the Joint Petition, as supplemented, and allow the exemption permitting NNW to consummate its transactions with DM&E to become effective thirty days after filing of the Verified Notice of Exemption, or on February 24, 2010.

Respectfully submitted,

NEBRASKA NORTHWESTERN RAILROAD, INC.

By: \_\_\_\_\_

Michael W. Blaszak

211 South Leitch Avenue

La Grange, Illinois 60525-2162

(312) 373-6611

Dated: February 18, 2010

CERTIFICATE OF SERVICE

Michael W. Blaszak hereby certifies that on February 18, 2010 he served the foregoing REPLY OF NEBRASKA NORTHWESTERN RAILROAD, INC. TO JOINT PETITION FOR REJECTION AND STAY OF CLASS EXEMPTION on the following individuals, first class postage prepaid:

Thomas F. McFarland

Thomas F. McFarland, P.C.

208 South LaSalle Street, Suite 1890

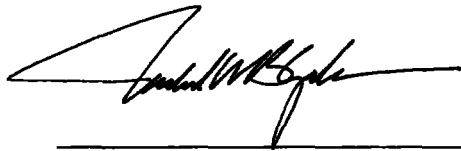
Chicago, Illinois 60604-1112

Paul M. Donovan

Laroe, Winn, Moerman & Donovan

1250 Connecticut Avenue, N.W.

Washington, D.C. 20036



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BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB FINANCE DOCKET NO. 35346

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NEBRASKA NORTHWESTERN RAILROAD, INC.  
PURCHASE, LEASE AND OPERATION EXEMPTION  
DAKOTA, MINNESOTA & EASTERN RAILROAD CORPORATION

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VERIFIED STATEMENT OF  
GEORGE LA PRAY

I am George LaPray, Manager Administration of Nebraska Northwestern Railroad, Inc. ("NNW"). I am submitting this verified statement in opposition to the Joint Petition for Rejection or Stay of Class Exemption filed by Nebkota Railway, Inc. ("Nebkota") and West Plains Company in the captioned proceeding.

NNW has negotiated several contracts with Dakota, Minnesota & Eastern Railroad Corporation ("DM&E") for the purpose of providing freight railroad service between Chadron and Crawford, Nebraska. As stated in NNW's Verified Notice of Exemption, NNW will purchase DM&E's rail line between Mile Post 404.5 near Chadron, Nebraska and Mile Post 411.72 Engineering Station 7492 +73 near Dakota Junction, Nebraska, and will lease and operate DM&E's rail line between the last-named point and Mile Post 432.6 near Crawford, Nebraska, together with various side tracks, spur tracks, connections, and other facilities located therein. The length of the purchased line segment is 7.22 miles,

and the length of the leased line segment is 20.88 miles. The length of the rail line to be operated by NNW is 28.1 miles. NNW will be a Class III rail carrier upon consummation of these transactions after the exemption becomes effective.

I was general manager of Nebkota from 1994 to 2000. Nebkota began operations in 1994 on approximately 73.5 miles of former Chicago & North Western Transportation Company ("C&NW") track between Mile Post 404.3 near Chadron and Merriman, Nebraska. In addition to selling this trackage, C&NW granted Nebkota trackage rights over its line between Mile Post 404.3 and Crawford, Nebraska—the same track NNW now plans to purchase and lease. During recent years Nebkota has abandoned all of its track except for approximately four miles extending east from Mile Post 404.3, but it has retained the Chadron-Crawford trackage rights.

C&NW was acquired by Union Pacific Railroad Company ("UP") in 1995. In 1996 UP sold certain trackage in Nebraska, South Dakota and Wyoming, including the Chadron-Crawford track and a connecting line from Dakota Junction, Nebraska to Rapid City, South Dakota and beyond, to DM&E.

In view of that historical background, I will respond to the factual allegations made in the Joint Petition filed by Nebkota and West Plains Company.

The Joint Petition notes Nebkota's interest in acquiring the Chadron-Crawford line and characterizes NNW as "a newly-formed carrier . . . which has had no prior history or connection with this trackage." NNW is owned by individuals with deep roots in the agricultural economy of northwest Nebraska, and as stated above I have extensive experience with the Chadron-Crawford line through my previous employment with Nebkota. This is not a situation in which investors outside the area are acquiring track with the unstated intent of driving off the traffic and harvesting the track materials.

The Joint Petition alleges that Nebkota and West Plains Company would be harmed by NNW's acquisition of the Chadron-Crawford line for two reasons. First, the Joint Petition states that NNW would, or could, sever Nebkota's connection with DM&E. This is untrue.

In support of this allegation, Nebkota points to a 2008 agreement with DM&E under which Nebkota can haul traffic for DM&E between Chadron and Dakota Junction for \$150 per loaded car. Nebkota speculates that NNW would terminate this agreement pursuant to its thirty-day termination provision and insert itself as an intermediate carrier for this four-mile move, charging Nebkota a higher rate.

That won't happen, because the 2008 agreement has not been assigned by DM&E to NNW and Nebkota will retain a direct connection with DM&E. In one of the contracts between NNW and DM&E, DM&E agreed that it "shall relocate its Rule 260 Interchange Junction with Nebkota Railway, Inc. ("NRI") from Chadron, NE to Dakota Junction, NE." Nebkota has the rights, under its Chadron-Crawford trackage rights agreement, which *will* be assigned to and will bind NNW, to operate trains over the Chadron-Dakota Junction line and to interchange traffic with DM&E at Dakota Junction. NNW, which will succeed DM&E as the owner of the Chadron-Dakota Junction line, will not interfere with Nebkota's exercise of those preexisting rights.

Second, the Joint Petition questions "the ability of two rail carriers [NNW and Nebkota] to operate between Chadron and Dakota Junction" and "the ability of three rail carriers [DM&E, NNW and Nebkota] to operate between Dakota Junction and Crawford." Such concerns are baseless. Two railroads, Nebkota and DM&E (and its predecessors), have had the right to operate between Chadron and Dakota Junction since Nebkota commenced business in 1994. The existing trackage rights agreement between DM&E and Nebkota, which will be assigned by DM&E to NNW, will continue to govern those operations. After the transactions are completed, two railroads, NNW and Nebkota, will operate between Dakota Junction and Crawford, just as two railroads have the right to operate over this track today. NNW

will haul DM&E's traffic between these points under an agreement between those railroads. Again, the existing DM&E-Nebkota trackage rights agreement will continue to govern these operations.

To summarize my testimony, the creation of NNW has been carefully crafted to preserve Nebkota's existing operations and rights. Nebkota will continue to enjoy two connections, with DM&E at Dakota Junction and with BNSF Railway at Crawford. Nebkota will continue to have trackage rights over the Chadron-Crawford line, the only change being that NNW will be substituted for DM&E as the host carrier.

VERIFICATION


George La Pray, being first duly sworn, states that he is Manager Administration of Nebraska Northwestern Railroad, Inc., that he has read the foregoing statement, and that the same is true and correct to the best of his knowledge, information and belief.

A handwritten signature in cursive script, appearing to read "La Pray", is written over a horizontal line.

SUBSCRIBED and SWORN

before me this 15th day of

February, 2010.

A handwritten signature in cursive script, appearing to read "LeAnn Halland", is written over a horizontal line.

Notary Public

